STATE OF MICHIGAN

COURT OF APPEALS

HENRY ORAY, Plaintiff-Appellant,	UNPUBLISHED December 16, 2014
v	No. 321440 Oakland Circuit Court
CITY OF FARMINGTON HILLS, Defendant-Appellee.	LC No. 2013-134015-CZ

Before: DONOFRIO, P.J., and FORT HOOD and SHAPIRO, JJ.

PER CURIAM.

Plaintiff, proceeding *in propria persona*, appeals as of right from an order of the trial court dismissing his complaint against defendant pursuant to MCR 2.116(C)(7), (8), and (10). We affirm.

I. FACTS

Plaintiff's complaint arises out of his attempt to build an addition to his home in Farmington Hills. On October 5, 2011, plaintiff applied for a building permit to construct his addition. According to plans submitted with the application, the two-story addition would add 5 feet and 14 feet to the existing home to the south and west, respectively. The drawings indicated that the new structure would be 5 feet from the adjoining property line to the south, 10 feet from the adjoining property line to the north, and would stand 25 feet tall. The applicable zoning ordinance for plaintiff's property requires minimum side lots of 5 feet, a combined side lot total of 15 feet, and a maximum building height of 25 feet. Farmington Hills Ordinances, §§ 34.2.2, 34.3.1.7. Thus, it appears plaintiff's plans were drawn to comply precisely with the applicable zoning ordinance.

Plaintiff's permit was approved and he began constructing his addition, but as he did, he added dormers that were not included in his plan. A city inspector discovered the dormers and issued a stop work order. Plaintiff continued to work on the project, resulting in a citation for violation of this order on December 20, 2011. Three additional citations were issued on January 6, 2012, listing eight violations. At a hearing held on January 27, 2012, through a plea agreement, plaintiff admitted responsibility to the December 20, 2011 citation, and the remaining citations were dismissed. Defendant then asked the trial court to order that plaintiff vacate the structure, as two building officials had testified that it was structurally unsafe. The trial court

entered an order requiring plaintiff to vacate his home until a structural engineer could determine whether the addition was safe.

Plaintiff obtained the opinion of a structural engineering firm, which noted several structural deficiencies, and recommended a number of improvements to comply with the Michigan Building Code. Plaintiff also provided defendant with a certified survey. This survey noted that the addition was only 2.5 to 3.2 feet away from the southern property line and 11.2 to 11.3 feet from the northern property line. A building official advised plaintiff that he would need to obtain variances from the zoning board of appeals ("ZBA") to the side lot and height requirements. Plaintiff submitted an application for the variances and attended a meeting on April 17, 2012, where he explained to the ZBA why he needed the variances. He admitted that, because of the dormers, his structure exceeded the 25-foot height limit, and explained that the result of the survey was "unexpected." The ZBA denied his request for variances.

On February 28, 2013, an additional three citations were issued to plaintiff, naming eight violations. Before these citations were adjudicated, plaintiff filed a five-count complaint against defendant in the circuit court. His first count alleged a violation of his procedural due process rights. The second count alleged violations of the Michigan Zoning Enabling Act ("MZEA"). The third count alleged an unconstitutional taking of his property. The fourth count alleged violations of the Open Meetings Act ("OMA"). The final count alleged violations of plaintiff's substantive due process and equal protection rights.

On July 12, 2013, a hearing was held regarding the February 28, 2013 citations. Plaintiff was found responsible for seven of the eight violations. Four days later, defendant filed a motion seeking an order requiring plaintiff to remove the addition, or alternatively, to allow defendant to enter the property and remove the addition itself, at plaintiff's expense. The district court granted the motion and entered the requested order. On January 29, 2014, defendant moved for summary disposition of plaintiff's complaint. Plaintiff filed a written response, and after hearing oral arguments from both sides, the trial court granted the motion.

II. STANDARD OF REVIEW

A trial court's ruling on a motion for summary disposition presents a question of law subject to de novo review. *Titan Ins Co v Hyten*, 491 Mich 547, 553; 817 NW2d 562 (2012). Summary disposition pursuant to MCR 2.116(C)(7) is appropriate if a claim is barred by the applicable statute of limitations. *Nuculovic v Hill*, 287 Mich App 58, 61; 783 NW2d 124 (2010). A motion under MCR 2.116(C)(8) "tests the legal sufficiency of the pleadings alone." *Id.* A motion should be granted under MCR 2.116(C)(8) "only when the plaintiff's claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Clohset v No Name Corp*, 302 Mich App 550, 558; 840 NW2d 375 (2013) (internal quotation marks omitted). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). The court reviews "a motion brought under MCR 2.116(C)(10) by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Id.*

III. DISCUSSION[1]

A. PROCEDURAL DUE PROCESS CLAIM

Plaintiff first argues that the trial court erred when it granted summary disposition in regard to his procedural due process claim pursuant to MCR 2.116(C)(10). We disagree.

"Procedural due process serves as a limitation on governmental action and requires a government to institute safeguards in proceedings that might result in a deprivation of life, liberty, or property." *Mettler Walloon, LLC v Melrose Twp*, 281 Mich App 184, 213; 761 NW2d 293 (2008). "[P]rocedural due process requires that a party be provided notice of the nature of the proceedings and an opportunity to be heard by an impartial decision maker at a meaningful time and in a meaningful manner." *Id*. at 213-214.

Plaintiff first argues generally that his project did comply with applicable zoning ordinances and building codes, in effect contesting the results of the court hearings below. This argument is irrelevant. The question is not whether the various decisions regarding the citations and zoning requirements were correct but whether plaintiff was afforded due process in regard to the citations and zoning violations. The citations themselves served as notice of the problems with plaintiff's construction project. Defendant produced evidence demonstrating that plaintiff was not only afforded an opportunity to a hearing regarding every citation, but that he actively participated in those hearings. Regarding the ZBA's decision, the minutes of the April 17, 2012 ZBA meeting show that plaintiff was allowed ample opportunity to explain his position. While plaintiff disagrees with the decisions reached in the various court hearings and at the ZBA meeting, his disagreement does not demonstrate that he was denied procedural due process.

Plaintiff also seems to argue that, under *Pittsfield Twp v Malcolm*, 375 Mich 135; 134 NW2d 166 (1965), defendant should be equitably estopped from enforcing the zoning restrictions. No such claim was raised in plaintiff's complaint, nor was it ever raised by plaintiff in the trial court. Accordingly, it need not be considered by this Court. *Booth Newspapers, Inc v Univ of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). Further, *Pittsfield Twp* is not comparable to the instant case. In *Pittsfield Twp*, the defendant obtained a permit from the plaintiff and constructed a facility, at great expense, in reliance on and in conformity with the permit. *Pittsfield Twp*, 375 Mich at 137-138. The defendant operated the facility, a kennel, for over 10 months, at which time the plaintiff filed suit after determining that the permit was erroneously issued because the applicable zoning ordinance did not permit kennels. *Id*. Our Supreme Court held that the circumstances were "so exceptional" that the plaintiff was estopped from enforcing the ordinance. *Id*. at 148. This was because all parties acted in good faith, notice of the intended use of the structure was made known while it was under construction, the

[1] Defendant argues that plaintiff's appeal should be dismissed pursuant to MCR 7.211(C)(2)(b). Defendant previously filed a motion to dismiss plaintiff's appeal under this rule, raising the same arguments it now raises in its brief on appeal. This Court denied the motion, *Oray v Farmington Hills*, unpublished order of the Court of Appeals, entered October 10, 2014 (Docket No. 321440), and we see no reason to reach a different result.

defendant had expended a substantial sum to build the structure, and the plaintiff waited 10 months after the structure was completed to seek to enforce the zoning ordinance. *Id*. Here, it is clear that plaintiff submitted a set of plans that were approved, and then proceeded to build a structure that did not match his plans. The plans submitted with the permit also failed to accurately depict the property lines. As soon as the discrepancy was discovered, defendant issued a stop work order; however, plaintiff continued to work on the project. Plaintiff also failed to comply with applicable building codes. No exceptional circumstances akin to those in *Pittsfield Twp* exist in this case.

Plaintiff's remaining arguments relate to proceedings that occurred after his complaint was filed. Thus, none of these proceedings were mentioned in plaintiff's complaint, nor did he allege any violation of procedural due process arising from these proceedings. Accordingly, no procedural due process claims related to these proceedings were before the trial court. See MCR 2.111(B)(1) (a complaint must include a "statement of the facts . . . on which the pleader relies in stating the cause of action . . . ."). Even if these claims were before the court, plaintiff presented no evidence creating a question of fact regarding whether he was denied procedural due process in regard to any of these proceedings. While he argues he was denied due process in regard to four appeals he filed in the circuit court, plaintiff presented no evidence regarding these appeals whatsoever in responding to defendant's motion, and accordingly, did not create a question of fact regarding whether he was denied procedural due process in the context of these appeals.

Plaintiff also argues that he was entitled to notice and a hearing before the district court could order him to remove his addition pursuant to Farmington Hills Ordinances §§ 7-252, 7-253, and 7-256. These ordinances require notice and a hearing before the demolition of structures found to be dangerous buildings. Farmington Hills Ordinances §§ 7-252, 7-253, and 7-256. Defendant did not seek demolition of the addition pursuant to these ordinances; rather, it sought demolition as a means of enforcing the zoning ordinance and building codes, after plaintiff was found responsible for seven civil infractions, pursuant to Farmington Hills Ordinances § 1-24(b) ("In addition to ordering the defendant determined to be responsible for a municipal civil infraction to pay a civil fine, costs, damages and expenses, the judge or magistrate shall be authorized to issue any judgment, writ or order necessary to enforce, or enjoin violation of, this Code."). Farmington Hills Ordinances §§ 7-252, 7-253, and 7-256 are irrelevant.

B. ALLEGED VIOLATIONS OF THE MICHIGAN ZONING ENABLING ACT

Plaintiff's second issue purports to challenge the trial court's decision to grant summary disposition of his second count, which alleged violations of the MZEA, pursuant to MCR 2.116(C)(8). However, in his brief, plaintiff offers no substantive analysis of the issue, instead discussing only the relief he seeks. "When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting plaintiffs the relief they seek." *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 381; 689 NW2d 145 (2004) (quotation marks, brackets, ellipses, and citation omitted). Further, as plaintiff has provided no argument regarding how his complaint demonstrated a violation of the MZEA, he has abandoned the issue on appeal. *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008) (an appellant abandons an issue by failing to address its merits).

C. UNCONSTITUTIONAL TAKING CLAIM

Plaintiff next argues that the trial court erred when it granted summary disposition pursuant to MCR 2.116(C)(10) regarding his claim of an unconstitutional taking of his property. We disagree.

In his complaint, plaintiff asserted that a regulatory taking occurred under *Penn Central Transp Co v New York*, 438 US 104; 98 S Ct 2646; 57 L Ed 2d 631 (1978). Courts apply a three-factor balancing test to determine whether a regulatory taking occurred, which includes consideration of (1) "the economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-back expectations," and (3) "the character of the government action." *K & K Const, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 528; 705 NW2d 365 (2005).

Plaintiff is not entitled to relief pursuant to his *Penn Central* takings claim. Plaintiff produced no evidence demonstrating that the zoning ordinance sought to be enforced was not equally applicable to all similarly situated property owners, nor did he produce evidence demonstrating that he was unaware of the zoning ordinance or could not have reasonably known of the ordinance at the time he purchased his property. Further, it is clear that the zoning ordinance allows defendant to make valuable use of his land. The ordinance allows plaintiff to use the property for residential purposes, so long as his residence meets certain height and setback requirements. Farmington Hills Zoning Ordinances, § 34-3.1.7. Accordingly, plaintiff failed to present evidence creating a question of fact regarding whether a regulatory taking occurred under *Penn Central*. See *K & K Const, Inc*, 267 Mich App at 528-529.

Plaintiff also cites case law discussing de facto takings by inverse condemnation, but offers no substantive discussion of how such a taking occurred in this case. As such, plaintiff has abandoned the issue on appeal. *Woods*, 277 Mich App at 626-627. Moreover, plaintiff did not produce evidence supporting a claim of a de facto taking through inverse condemnation. Such a claim requires proof of two elements: 1) "that the government's actions were a *substantial* cause of the decline of its property value," and 2) that "the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property." *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 548; 688 NW2d 550 (2004)(emphasis in original)(citations omitted). Even assuming plaintiff could demonstrate some sort of abuse of power, plaintiff offered no evidence regarding the value of his property either before or after any of defendant's actions in this case, and thus, did not present evidence creating a question of fact regarding a decline in his property value. Accordingly, plaintiff did not present evidence creating a question of fact regarding whether a de facto taking occurred. *Id*. at 548.

D. OPEN MEETINGS ACT CLAIM

Plaintiff next argues that the trial court erred by granting summary disposition in regard to his claim for violations of the Open Meetings Act ("OMA") pursuant to MCR 2.116(C)(7). We disagree.

The trial court granted summary judgment in regard to plaintiff's OMA claim pursuant to MCR 2.116(C)(7) after determining that it was time-barred by MCL 15.270(3)(a). On appeal,

plaintiff argues that he sought a declaratory judgment, and that declaratory judgments are not subject to any statute of limitations. However, plaintiff did not raise such an argument in the trial court, nor did he seek declaratory relief. Rather, in regard to his OMA claim, plaintiff asked the trial court to "invalidate a decision of [the] zoning board of appeal on [April 17, 2012] . . . on the ground that it was not taken in conformity with the requirements of MCL 15.263(1), (2), (5), [and] (6)." We decline to address the issue for the first time on appeal. *Booth Newspapers*, 444 Mich at 234.

E. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION CLAIM

Finally, plaintiff argues that the trial court erred when it granted summary disposition in regard to the fifth count of his complaint, which alleged substantive due process and equal protection violations, and sought to impose liability on defendant pursuant to 42 USC 1983 and *Monell v New York City Dep't of Social Servs*, 436 US 658; 98 S Ct 2018; 56 L Ed 2d 611 (1978).[2] We disagree.

"To sustain a substantive due process claim against municipal actors, the governmental conduct must be so arbitrary and capricious as to shock the conscience." *Mettler Walloon,* 281 Mich App at 198. Plaintiff believes that city officials acted arbitrarily and unreasonably by issuing citations to plaintiff for various violations, seeking an order prohibiting him from living in his home, and obtaining an order to remove the addition he has constructed. However, it is clear that defendant's actions were taken in order to enforce the applicable zoning ordinances and building codes. Local governments have "authority to regulate land use pursuant to the police power reserved to the states and delegated to local governments." *Risko v Grand Haven Charter Twp Zoning Bd of Appeals*, 284 Mich App 453, 462; 773 NW2d 730 (2009). State law also provides local governments with authority to enforce state building codes if they so desire by enacting an ordinance to that effect, as defendant did. MCL 125.1508b; Farmington Hills Ordinances, § 7-26.

Defendant issued citations that notified plaintiff of the deficiencies and sought adjudication of those citations through the courts, as it was entitled to do. MCL 125.1508b; MCL 600.8701 *et seq*; Farmington Hills Ordinances, § 1-18. Given that two city officials had testified that the addition was unsafe, a fact later confirmed by the list of structural improvements an engineer found were required to meet state building codes, it was entirely reasonable for defendant to request an order prohibiting plaintiff from occupying his home. After plaintiff admitted responsibility to violating the stop work order, pursuant to Farmington Hills Ordinances, § 1-24(d), defendant was able to seek "any equitable or other remedies available . . . [,]" and pursuant to Farmington Hills Ordinances, § 1-24(b), the district court was "authorized to issue any judgment, writ[,] or order necessary to enforce, or enjoin violation of," the code of ordinances. Pursuant to these same ordinances, it was entirely reasonable for defendant to seek an order to remove the addition because the addition violated the applicable zoning ordinance

[2] *Monell* extended liability under 42 USC 1983 to local governments if "the execution of an official policy or custom caused a person to be deprived of federal constitutional rights." *Carlton v Dep't of Corrections*, 215 Mich App 490, 505; 546 NW2d 671 (1996).

and state building codes. None of defendant's actions were unreasonable, let alone "so arbitrary and capricious as to shock the conscience." *Mettler Walloon*, 281 Mich App at 198. Accordingly, the trial court properly granted summary disposition in defendant's favor pursuant to MCR 2.116(C)(10).

Plaintiff does not discuss his equal protection claim in his brief on appeal. Accordingly, he has abandoned the issue on appeal. *Woods*, 277 Mich App at 626-627 (an appellant abandons an issue by failing to address the merits of the issue).

As summary disposition was appropriate in regard to plaintiff's constitutional claims, he is not entitled to relief under 42 USC 1983 and *Monell*, 436 US 658. "Section 1983 provides a federal remedy against any person who, under color of state law or custom having the force of law, deprives another of rights protected by the constitution or laws of the United States." *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995) (citations omitted). Without an underlying constitutional violation, plaintiff's claim under 42 USC 1983 necessarily fails. See *id*.

Affirmed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Douglas B. Shapiro